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ALEXANDER L. STEVAS,
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No. 84-1428

In The

Supreme Court of the United States

October Term, 1984

THOMAS M. TRECKER,

Petitioner,

v.

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Seventh Circuit abuse its discretion in assessing double costs and reasonable attorneys fees against appellant's counsel?

2. Where the Wisconsin Court of Appeals expressly held that under Wisconsin law petitioner's demand for stock redemption was irrevocable, and where the Wisconsin Supreme Court declined to review that decision, did the Federal Appeals Court below properly refuse to reconsider the same question of Wisconsin law?

PARTIES TO THE PROCEEDINGS

Thomas M. Trecker is the only captioned petitioner, but it is obvious that the principal party seeking relief is Attorney Hugh Braun, Trecker's attorney. Therefore the caption as reflected in the Petition is not in compliance with Rule 33.2(a)(4), Supreme Court Rules. Nevertheless, throughout the Respondents' Brief the respondents will refer to "Petitioners" in recognition of the real interests being presented herein.

Pursuant to Rule 28.1, Supreme Court Rules, the respondents hereby indicate that respondent Wisconsin Marine, Inc. (now Ransomes, Inc.) is a wholly-owned subsidiary of Ransomes, Sims and Jefferies, Ltd., a British corporation that has no parent corporation.

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1912

§ 1912. Damages and Costs on Affirmance.

Where judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Rule 38, Federal Rules of Appellate Procedure.

Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

28 U.S.C. § 1738

§ 1738 State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Thomas M. Trecker and respondent Dane T. Scag were 40% and 60% stockholders, respectively, in respondent Wisconsin Marine, Inc. ("WMI"). Pursuant to a stock purchase agreement between Trecker, Scag and WMI, Trecker demanded redemption of his WMI stock in December, 1973. No action was taken on the demand until December of 1976, when it was formally rejected. Trecker commenced a specific performance action against WMI in state court in December, 1976, to compel performance of the agreement for the redemption of his stock. After a two-day trial the state court held the agreement enforceable, and judgment was entered in May, 1978, compelling WMI to redeem Trecker's then 34%[1] interest for approximately $166,000 over a period of 18 months. Shortly after the entry of that judgment, WMI sought leave of the state court to permit prepayment of that judgment to permit Scag to enter an agreement with a British firm, the respondent, Ransomes, Sims & Jefferies, Ltd. ("Ransomes") for subscription to a 34% interest in Wisconsin Marine, Inc. After a hearing, the trial court allowed that prepayment.[2]

Although he was the prevailing party in his action for specific performance of the stock redemption agree-

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[1]Capital contributions by Scag after December of 1973 reduced Trecker's interest to 34.2%. *Trecker v. Scag*, 679 F.2d 703, 704 (7th Cir. 1979).

[2]Trecker's petition is heavily laced with aspersions and base accusations of fraud and misrepresentation by the respondents in the state court proceedings, and particularly at this hearing. This inexcusable attempt to place the respondents in a bad light is discussed at length at pp. 7-9, *infra*.

ment, Trecker appealed the state trial court's judgment in his favor because he disputed the court's choice of the date of valuation of Trecker's stock for purposes of applying the terms of the redemption agreement. The Wisconsin Court of Appeals affirmed the trial court's choice of valuation date as an appropriate exercise of the court's discretion. *Trecker v. Scag*, No. 78-016 (Nov. 27, 1979) (Slip Op.). Trecker's petition to the Wisconsin Supreme Court for review of that decision was denied. *Trecker v. Wisconsin Marine Inc.*, 95 Wis. 2d 745, 293 N.W.2d 925 (1980) (table).

In August, 1979, Trecker commenced a securities fraud action in the United States District Court for the Eastern District of Wisconsin alleging that the 34% interest in WMI was sold to Ransomes for a price substantially in excess of the amount for which Trecker's stock had been redeemed, and that Scag's and WMI's alleged failure to disclose the fact of the negotiations or the details thereof violated federal securities laws. The district court granted the defendants' motion to dismiss Trecker's claims, insofar as they sought to impose liability for any alleged misrepresentations at the June 28, 1979 hearing, reasoning that "even if the defendants were guilty of an intentional misrepresentation as to the price Ransomes had agreed to pay for the WMI stock, the misrepresentation could not have caused the plaintiff's alleged damages." *Trecker v. Scag*, 481 F.Supp. 861, 865 (E.D. Wis. 1979).[3] It then granted summary judgment dismissing Trecker's action on the ground that it was barred by the applicable statute of limitations. *Trecker v. Scag*, 500

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[3]Trecker did not appeal this ruling. See *Trecker v. Scag*, 679 F.2d 703, 704 (7th Cir. 1982).

F. Supp. 752 (E.D. Wis. 1980). Finally, it denied Trecker's motion for reconsideration of the summary judgment of dismissal, rejecting Trecker's fraudulent concealment arguments and adding as a further basis for summary judgment that because all of Trecker's efforts to enforce his rights under the contract requiring the redemption of his stock took place before the respondents opened negotiations, those negotiations could not have been material to Trecker's investment decision. *Trecker v. Scag*, 514 F. Supp. 364 (E.D. Wis. 1981). Trecker appealed to the United States Court of Appeals for the Seventh Circuit, which reversed and vacated the district court's rulings and returned the case for a determination of whether, under Wisconsin law, Trecker's demand for redemption was irrevocable because, if it was, then the alleged fraud of the defendants, which was alleged to have taken place after Trecker's redemption demand, could not be material within the meaning of § 10(b) of the Securities and Exchange Act of 1934. *Trecker v. Scag*, 679 F.2d 703 (7th Cir. 1982).

In early 1980, while Trecker's federal securities fraud action was pending, Trecker moved to reopen the state court proceeding on the ground that the defendants perpetrated a fraud on the state court at the June 28, 1978, hearing. The trial court denied Trecker's motion, and Trecker again took an appeal to the Wisconsin Court of Appeals. On July 21, 1982, the Wisconsin Court of Appeals affirmed the trial court's refusal to reopen, holding that the defendants' sale of an interest in WMI to Ransomes at a price exceeding the redemption price for Trecker's stock could not have affected Trecker's decision to demand redemption, and therefore could not constitute fraud, because Trecker's "decision [to demand redemption] was

irrevocable." *Trecker v. Scag*, No. 81-1949 (Ct. App. July 21, 1982), Slip Op. at 9.

Because of that decision by the Wisconsin Court of Appeals expressly addressing the issue of irrevocability, the defendants sought further reconsideration[4] of the seventh circuit's decision reversing the district court on the issue of irrevocability. Although reconsideration was denied, the seventh circuit, on July 30, 1982, included the following language in its order of denial:

> Defendants now have the information we said they lacked and should put before Judge Gordon, see pages 13-14 of our June 3 slip opinion. When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme Court of Wisconsin should disagree with the Wisconsin Court of Appeals opinion.

Order dated July 30, 1982. [Appendix A] Trecker petitioned the Wisconsin Supreme Court to review the Wisconsin Court of Appeals decision regarding irrevocability, and review was denied. *Trecker v. Wisconsin Marine Inc.*, 108 Wis. 2d 790, 324 N.W.2d 778 (1982) (table). Thereafter, based upon the Wisconsin Court of Appeals' determination of the issue of irrevocability, and following the implicit direction of the seventh circuit, the district court again granted summary judgment dismissing the plaintiff's securities fraud action on the ground that, because the Wisconsin Court of Appeals had determined that Trecker's demand for redemption was irrevocable as

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[4]The respondents had petitioned for rehearing and rehearing en banc after the seventh circuit's reversal of Judge Gordon's rulings, which petitions had been denied the day before the Wisconsin Court of Appeals issued its decision on irrevocability. Therefore the respondents sought reconsideration of the seventh circuit's denial of their petition for rehearing.

of December of 1973, which was prior to WMI's negotiations with Ransomes, Trecker could not establish the element of materiality required for a successful 10b-5 action. *Trecker v. Scag,* 569 F. Supp. 844 (E.D. Wis. 1983).

Once again Trecker appealed to the Court of Appeals for the Seventh Circuit, arguing that the Wisconsin Court of Appeals' determination of the issue of irrevocability did not foreclose the federal court's re-examination of that issue of state law. The seventh circuit on November 6, 1984, affirmed the district court's dismissal of the action, holding that the second Wisconsin Court of Appeals' decision had squarely resolved the outstanding dispositive issue that had prompted the seventh circuit's prior reversal of the district court's orders dismissing the action and that federal courts were not free to re-examine questions of state law fully and fairly litigated in state courts. *Trecker v. Scag,* 747 F.2d 1176, 1179 (7th Cir. 1984). Based upon what the court perceived as an appeal that had no reasonable expectation of success, it concluded that the appeal was frivolous and assessed double costs and reasonable attorneys' fees against appellant's counsel pursuant to its authority under Rule 38, Federal Rules of Appellate Procedure. 747 F.2d at 1180. Trecker's petition for rehearing, limited only to the issue of the assessment of costs and attorneys' fees, was denied on December 7, 1984, and double costs of $220 and attorneys' fees of $3,465 against Attorney Braun personally were added to the judgment.

B. Correction of Petitioners' Distortions and Misstatements.

Trecker's and Braun's petition makes repeated accusations of fraud and misrepresentation by the respond-

ents in the state court proceedings in an obvious effort to cast the respondents in a bad light. See, e.g., Petition at 4 ("It was represented at that hearing that Trecker's 34% interest in the company was being sold to Ransomes for $124,176.00 . . . ."); 5 (" . . . Scag deliberately misrepresented that Trecker's stock was to be sold to Ransomes for $124,176.00 while in fact the agreement then in possession of Scag and his counsel provided in ¶ 1 that the stock was to be sold for $624,176.00"); 11 ("Trecker has been victimized by an outrageous fraud . . . involving at least a half million dollars."); 12 ("After Trecker learned of the fraud of Scag in misrepresenting the value at which his interest in the company was sold to Ransomes . . . ."). These unfounded accusations all arise from the June 28, 1978, hearing before the Jefferson County Circuit Court on the motion of respondent WMI to accelerate payment of the judgment previously rendered in favor of Trecker in his state court action. That hearing before Judge Gergen was lengthy and dealt almost exclusively with the negotiations between WMI and Ransomes and the terms of their agreement.

The respondents have maintained consistently throughout all of these proceedings that the agreement between WMI and Ransomes contemplated that Ransomes would contribute $124,176 (the book value of Trecker's shares as of December, 1973) toward the cost of redeeming Trecker's shares, with Scag required to pay an additional $40,000 to equal the court-ordered redemption amount. Ransomes was also to make a $500,000 capital contribution refundable if it chose later not to exercise its option for the purchase of the remaining shares in the company. The actual terms of the agreement between respondents

Ransomes and Wisconsin Marine, Inc. were articulated by the Court of Appeals for the Seventh Circuit as follows:

> (1) Trecker's stock must be fully redeemed as a pre-condition. (2) Ransomes would pay $124,176 toward the expenses of the redemption and make a $500,000 contribution to WMI capital; it would receive shares equalling a 34.1% interest in WMI, and no additional shares would be issued to dilute its interest. (3) By September 1979 Ransomes would either exercise an option to acquire the balance of WMI's shares or cancel the deal and have its entire $624,176 refunded. (4) Scag would remain as president of WMI for five years.

679 F.2d at 705.

Nothing in the June 28, 1978, hearing was to be contrary. The proceedings at the June 28, 1978, hearing have been examined by several courts in this litigation and relevant excerpts of the transcript have been quoted in several court opinions. See *Trecker v. Wisconsin Marine, Inc.*, No. 81-1949 (July 21, 1982) Slip Op. at 6; *Trecker v. Scag*, 500 F. Supp. 752, 755 (E.D. Wis. 1980); *Trecker v. Scag*, 514 F. Supp. 364, 366 (E.D. Wis. 1981); *Trecker v. Scag*, 679 F.2d 703, 707-08 (7th Cir. 1982). An examination of Mr. Koch's [Scag's attorney] remarks at that hearing indicate that he repeatedly stressed the fact that Ransomes was to pay $124,176 toward the cost of redeeming Trecker's stock, that Scag was personally to pay the remaining approximately $40,000 to equal the court-ordered redemption price, and that Ransomes was also to make a $500,000 capital contribution refundable if it later elected not to acquire the remainder of WMI. [See Appendix B]. Mr. Braun's comments at that hearing indicate that he, too, was clearly aware of the nature of the transaction and the sums of money involved. [See

Appendix B at 3]. Moreover, no court in these proceedings has concluded that the respondents have perpetrated any fraud at all. In fact, the very essence of the determination of the Wisconsin Court of Appeals on June 21, 1982, and later of the Court of Appeals for the Seventh Circuit when it virtually directed Judge Gordon to enter summary judgment in Trecker's 10b-5 action, is that there was no fraud because the respondents' negotiations did not and could not have affected Trecker's decision to seek redemption of his stock. Accordingly, the petitioners' accusations[5] of fraud are irrelevant and improper and should be disregarded as an obvious attempt to color these proceedings.

—o—

SUMMARY OF ARGUMENT

Thomas M. Trecker appears as the sole named petitioner in the caption of this matter, but it is clear that the primary impetus for seeking a writ of certiorari comes from petitioner's counsel, who is protesting the assessment of $3,685 of costs and attorneys' fees. Only tangentially does the petitioner challenge the merits of the court of appeals' affirmance of the district court, suggesting that the decision must be reviewed in order to evaluate the appropriateness of the court of appeals' imposition of sanctions.

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[5]Another example of the petitioners' efforts to misstate and distort the facts appears at p. 12 of their petition: " . . . Judge John B. Danforth denied the motion to reopen on the ground that the fraud occurred after redemption . . ." Nowhere in his decision and opinion denying Trecker's motion to reopen did Judge Danforth state that any fraud had occurred.

Federal courts have long been empowered to impose sanctions in cases where appeals are taken for purposes of delay. This court often, indeed routinely, made use of that sanction and expressly acknowledged that it would do so without hesitation. Courts of appeal have occasionally deemed it appropriate to assess such damages directly against an attorney, and occasionally jointly against the attorney and the unsuccessful appellant.

The Seventh Circuit Court of Appeal's assessment of counsel's fees against Attorney Braun did not constitute a denial of due process, contrary to Mr. Braun's assertion. Due proc ss is a flexible concept which calls for varying procedural protections depending upon the circumstances. In the present case the respondents' demand seeking costs and fees for a frivolous appeal were clearly announced in the respondents' principal brief before the court of appeals, and yet the petitioner and his counsel chose not to address the issue in their reply brief. Trecker and his counsel sought rehearing limited only to this very issue, and even prepared a brief on this issue to the court of appeals which contained, among other things, an affidavit of Mr. Braun disclaiming any improper motive for pursuing the appeal, but again they failed to raise their constitutional concerns. Furthermore, a practicing attorney and member of the bar of the court of appeals should be charged with familiarity with the rules of practice before that court and the applicable federal statutes governing the imposition of costs and damages, and should need less in the way of procedural protection than a non-attorney litigant. Counsel for the petitioner received the procedural protections he was due.

Nor did the court of appeals err regarding the preclusive effect of the second Wisconsin Court of Appeals' decision on the irrevocability of Trecker's stock redemption demand under Wisconsin law. The irrevocability issue was fully litigated, having been considered twice by the Wisconsin Court of Appeals, the second time as a determination necessary to its holding in the case. The Court of Appeals for the Seventh Circuit virtually directed the district court to grant summary judgment dismissing the action based upon the collateral estoppel effect to be given the Wisconsin Court of Appeals' decision, and having so guided the district court, it thereafter properly concluded that Trecker's appeal to that same court had no reasonable likelihood of success. Based upon that objective assessment, it properly invoked its authority under Rule 38, Federal Rules of Appellate Procedure, to assess double costs and counsel's fees against Mr. Braun.

This petition has even less merit than the petitioners' appeal to the circuit court below. Having failed to show the existence of any of the criteria generally applied by this Court for granting such petitions, the petitioners should be assessed double costs and attorney fees for yet another frivolous appeal.

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ARGUMENT

I. The Discretionary Power Of This Court And Courts Of Appeal To Award Double Costs And Damages For Frivolous Appeals Is Well Established, And Its Exercise By The Court Of Appeals In This Case Was Appropriate And Should Not Be Disturbed.

A. The Court's Discretionary Authority to Assess Costs and Fees is Well-settled.

The power of this Court and the courts of appeal to assess damages for delay in an appropriate case finds its genesis in the first session of Congress in 1789:

> and whereupon such writ of error the Supreme or a Circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.

Judiciary Act of 1978, Ch. 20, § 23, 1 Stat. 85 (1789). The subsequent history of that statute, and its incorporation into the rules governing practice before this Court, was outlined in detail in *West Wisconsin Railway Company v. Foley*, 94 U.S. 100 (1877), in which the Court decided that Supreme Court Rule 23 then in effect gave the Court discretion to award an amount less than, but not greater than, the mandated 10% damages for delay. 94 U.S. at 103-104. This statutory authorization was codified subsequently as R.S. § 1010; later as 28 U.S.C. § 878, and now, 28 U.S.C. § 1912. This power is also recognized in Rule 49.2 of the Rules of Practice before this Court, and in Rule 38, Federal Rules of Appellate Procedure. See 9 *Moore's Federal Practice*, ¶ 238.01 et seq. and 13 *Moore's Federal Practice*, ¶ 849.03; 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 3984. Over the years this Court has frequently used its power to assess damages in cases of frivolous appeals.

In *Amory v. Amory*, 91 U.S. 356, 357 (1875), the Court, discussing R.S. § 1010, observed that

> This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time.

See also *Deming v. Carlisle Packaging Company*, 226 U.S. 102 (1912).

In addition to these statutory bases for an award of costs or fees, this Court has recognized the "inherent power" of courts to assess attorneys fees and costs in situations where litigation is pursued in bad faith. *Alyeska Pipeline Co. v. Wildnerness Society*, 421 U.S. 240, 258-259 (1975). Recently this Court affirmed that this inherent power also extends to the assessment of costs and attorneys fees against counsel who willfully abuse the judicial process. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980). Since *Roadway* was decided, Congress amended 28 U.S.C. § 1927 to create a statutory basis for such awards against attorneys. Antitrust Improvements Act of 1980, Pub.L. 64-349, § 3, 94 Stat. 1156. Drawing on this well-settled and multi-based power, courts of appeal have frequently assessed costs and attorneys fees against offending counsel. See *Acevedo v. Immigration and Naturalization Service*, 538 F.2d 918 (2d Cir. 1976); *Der-Rong Chour v. Immigration and Naturalization Service*, 578 F.2d 464 (2d Cir. 1978); *Good Hope Refineries, Inc. v. Brashear*, 588 F.2d 846 (1st Cir. 1978); *Bankers Trust Co. v. Publicker Industries*, 641 F.2d 1361 (2d Cir. 1981); *United States v. Potamkin Cadillac Corp.*, 697 F.2d 491 (2d Cir. 1983); *TIF Instruments, Inc. v. Colette*, 713 F.2d 197 (6th Cir. 1983) (inherent authority);

Reid v. United States, 715 F.2d 1148 (7th Cir. 1983); *United States v. Nesglo, Inc.*, 744 F.2d 887 (1st Cir. 1984); *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984).

B. Petitioners were Afforded Ample Procedural Due Process But Failed to Take Advantage of Their Opportunities.

The petitioners contend that before the court of appeals could assess double costs and attorneys fees against Attorney Braun for pursuing a frivolous appeal in that court, it was required to grant an evidentiary hearing. Such a cumbersome procedure is not required by the Fifth Amendment nor by the Court's recent ruling in *Roadway Express, supra.*[6] In *Roadway* the district court dismissed a civil rights class action and assessed costs and attorneys fees for the entire lawsuit against the plaintiffs' counsel on a motion for sanctions under Rule 37 of the Federal Rules of Civil Procedure. This Court determined that the "costs" awardable under 28 U.S.C. § 1927 did not include attorneys fees, and therefore

[6]The petitioners also cite, but do not discuss, *Hovey v. Elliott*, 167 U.S. 409 (1897). Hovey involved a trial court's striking a defendant's answer and entering a decree *pro confesso* because the defendant disobeyed a prior court order. This court held that this sort of punishment was beyond the scope of the trial court's authority. The *Hovey* holding was modified significantly in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), in which this Court rejected a due process challenge to the same conduct by a trial court, holding that the trial court utilized a permissible presumption that the defendant's failure to comply with a pretrial order evidenced the defense's lack of merit. *Id.* at 381. See *Societe Internationale v. Rogers*, 357 U.S. 197, 206 (1958). *Hovey* is plainly inapposite, in that the sanction imposed there was held beyond a trial court's authority, whereas here the sanction imposed by an appellate court was based upon well established statutory and inherent authority endorsed and recognized by this Court and, as in *Hammond Packing*, arose from the lack of merit of the sanctioned party's position.

the district court's reliance on that section was improper, but that such an award was proper pursuant to Rule 37(b) of the Federal Rules of Civil Procedure and also the trial court's inherent power, although such a sanction as attorneys fees should not be assessed "without fair notice and an opportunity for hearing on the record." 447 U.S. at 767.[7]

Counsel's improper conduct in *Roadway Express* occurred at the trial court level, and therefore the sanctions were imposed at that level, whereas the sanctions against Mr. Braun in this case were assessed in an appellate court upon its conclusion that counsel abused the appellate process. *Trecker v. Scag*, 747 F.2d 1176, 1179-80 (7th Cir. 1984). Unlike the authority of the district court in *Roadway*, the appellate court in this case drew upon long-recognized authority to assess damages in frivolous appeals. These distinctions bear significantly upon the procedural due process warranted in this case.

In *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962), this court affirmed a district court's dismissal of a civil case with prejudice for failure to prosecute after plaintiffs' counsel failed to appear at a scheduled pretrial conference. The petitioner's argument therein that the district court's dismissal without a preliminary adversary hearing violated notions of due process was rejected:

> *The adequacy of notice and hearing respecting proceedings that may affect a party's rights turn, to a considerable extent, on the knowledge on which the circumstances show such party may be taken to have*

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[7]Following the Court's lead, the Joint Conference Report on P.L. 96-349, the Anti-Trust Improvements Act which amended 28 U.S.C. § 1927, indicated that sanctions under amended § 1927 should be accompanied by "appropriate" due process safeguards. 1980 U.S. Cong. Code & Ad. News 2783.

> *of the consequences of his own conduct.* The circumstances here were such as to dispense with the necessity for advanced notice and hearing.

370 U.S. at 632 [Emphasis supplied]. This Court has frequently recognized that due process is a flexible concept which calls for variable procedural protections as are warranted by a particular situation. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court stated that

> The function of legal process, as that concept is embodied in the Constitution, and in the realm of fact finding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.

The petitioner seeking relief in this case is Mr. Braun, a licensed practicing attorney admitted to practice before the Bar of the Court of Appeals for the Seventh Circuit and, presumably, this Court. Mr. Braun should be aware of the authority of the Courts of Appeals pursuant to 28 U.S.C. §§ 1912 and 1927 and Rule 38, Federal Rules of Appellate Procedure. Furthermore, as a practitioner, Mr. Braun should be charged with knowledge of the consequences that may befall a litigant or litigant's counsel in pursuing dilatory or frivolous litigation. Consequently, his need to be forewarned of such consequences is significantly less compelling than would be the need of a lay litigant.

More importantly, in keeping with the above-mentioned guidelines for the sufficiency of due process protec-

tions, it cannot be argued seriously that Mr. Braun was not accorded sufficient procedural due process in connection with the imposition of sanctions in this case. The petitioners disingenuously state that "no notice was given to counsel of the court's intention to impose sanctions nor was any opportunity provided for a hearing at which counsel could present evidence justifying the taking of the appeal." Petition at 9. But Trecker and his counsel were forewarned of the respondents' request for sanctions. The principal brief of the defendants-respondents in the seventh circuit stated at page 12:

> The conclusive and binding effect of the Wisconsin determinations coupled with the prior holding of this Court, makes the situation so clear that appellant's position is frivolous. His appeal should be dismissed on that ground. We urge that this Court make that determination and not only affirm the judgment of the lower court but require the appellant to pay the defendant-appellee and his counsel extraordinary costs because of this unnecessary appeal.
>
> "That this court has the power to do so is so clear that supporting authority is not required."

[Appendix C]. Rules 28(c) and 31(a), Federal Rules of Appellate Procedure, authorize the appellant to file a reply to the respondent's brief, and give the appellant 14 days after service of the respondent's brief to do so. The insubstantial reply brief filed by the petitioners in the seventh circuit failed to address the respondent's assertion that the appeal was frivolous and further failed to address the appropriateness of, or the procedure for, assessing costs and fees, despite the fact that they were clearly on notice of the respondents' intention to seek such sanctions. [Appendix D]. The aforementioned rules provided a clear opportunity for the appellant-petitioner to

advise the court of its position on the question of frivolous appeals or assessments of costs and fees, but for some reason the appellant-petitioner chose to forego that opportunity. Such a failure is particularly noteworthy in a case where the petitioner now claims that the court of appeals, in acting upon the defendants-respondents' unopposed request, committed a "clear violation of the due process clause. . . ." [Petition for writ of certiorari, at 9.]

Nor was the respondents' brief the only notification received by the petitioners that the respondents considered the petitioner's appeal frivolous. Contemporaneously with the filing of the respondents' brief containing the above-quoted language, the respondents filed a "Suggestion to Dismiss Without Oral Argument" pursuant to Rule 34, Federal Rules of Appellate Procedure, and Seventh Circuit Rule 14(f). [See Appendix E.] The first reason presented therein was that the appeal was frivolous. As noted above, not only did the petitioners fail to address the issue of frivolousness or the assessment of costs and fees in their reply brief, but in response to the respondents' suggestion to dispense with oral argument they filed a "Statement by Trecker as to Need for Oral Argument" [Appendix F] again failing to address the propriety of assessing costs and fees, or to indicate that oral argument might be necessary to consider that very issue.

In addition to foregoing all timely (i.e., before the fact) opportunities to raise what they now perceive to be the constitutional implications of the assessment of costs and fees against counsel for frivolous litigation, even after the court of appeals issued its decision on November 7, 1984, assessing double costs and fees against Mr. Braun personally, the petitioners again failed to raise their con-

stitutional concerns. They filed a petition for rehearing limited solely to the imposition of double costs and reasonable attorneys fees, accompanied by a supporting memorandum and an affidavit of Hugh R. Braun claiming that the appeal was not taken in bad faith, that it was not frivolous, and that the imposition of costs and fees should be reversed. But in the petitioners' effort to secure a rehearing it was never suggested that the imposition of costs and fees was constitutionally infirm or that a hearing was required, although it is clear that the petitioner and Mr. Braun could have done so at that time.[8] [Appendix G].

Finally, the petitioners inexplicably failed to offer any objection to the respondents' Bill of Costs and Attorneys Fees, a fact which did not go unnoticed by the court of appeals. See Order of January 25, 1985, awarding $3,465.00 in fees. ("Defendants-appellees request $3,465.00 as reasonable attorneys' fees *and no objection has been received.*") [Emphasis added.] [Appendix H].

Ordinarily the Supreme Court does not consider an issue not passed upon by the courts below. *Youackim v. Miller*, 425 U.S. 231 (1976); *Singleton v. Wulff*, 428 U.S.

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[8]Robert J. Martineau, a noted authority on appellate practice and procedure, suggests that due process is satisfied if, before an appellate court sanctions an attorney under its statutory or inherent power, the attorney is afforded an opportunity to present written arguments on the issue, and that where, as here, the request for sanctions comes from a party during the normal course of briefing or motion practice before the appellate court, the normal opportunities for responding to such a request are sufficient. Martineau, "Frivolous Appeals: The Uncertain Federal Response," 1984 Duke L.J. 845, 873, 884 (1984). Obviously, by Martineau's standards, Attorney Braun was not denied due process.

106 (1976). With respect to constitutional issues, only in unusual circumstances where an issue is considered "jurisdictional" will this Court consider such an issue when it is not raised at the earliest practicable opportunity. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962). The petitioners claim in their petition before this Court that the court of appeals' assessment of costs was constitutionally defective, while before the court of appeals the petitioners, even in their petition for rehearing, raised no due process claims at all. Having failed to bring those concerns before the court of appeals when they had a clear opportunity to do so, they should now be foreclosed from doing so before this Court. See *Hoover v. Ronwin*, — U.S. —, 104 S. Ct. 1989, 80 L.Ed.2d 590, 603 n.25 (1984).

Under these circumstances the appellate court's imposition of double costs and attorneys fees was not an abuse of discretion and should not be reviewed by this Court.

II. The Appellate Court's Conclusion That The Petitioners' Appeal Was Frivolous Was Correct And Therefore Not An Abuse Of Discretion.

Litigation between Mr. Trecker and the respondents herein involved trial court proceedings in both the state circuit court for Jefferson County, Wisconsin, and the United States District Court for the Eastern District of Wisconsin. Trecker appealed twice to the Wisconsin Court of Appeals and twice to the Wisconsin Supreme Court, where review was denied, and twice to the United States Court of Appeals for the Seventh Circuit. In the second of those federal court appeals, the seventh circuit concluded as follows:

> The conclusion that this appeal is frivolous seems inescapable. In the first appeal, we remanded for a determination whether Wisconsin law permitted a redemption demand to be withdrawn. After the decision of the Wisconsin Court of Appeals, we indicated in no uncertain terms that its decision disposed of that issue unless the Wisconsin Supreme Court reached a different conclusion. Trecker v. Scag, No. 81-1888 (7th Cir. July 30, 1982). When the Wisconsin Supreme Court declined to review the case, it should have been apparent to plaintiff's counsel that we would affirm the granting of summary judgment in favor of defendants.
>
> . . .
>
> Plaintiff's arguments on appeal lack any arguable merit at all. We can think of no other reason for this appeal other than delay, harassment or 'sheer obstinancy.' Id. Plaintiff could not have had any 'reasonable expectation of altering the district court's judgment,' id., in light of our order of July 30, 1982.

747 F.2d at 1179-80. In view of the long history of this litigation, it is apparent that the conclusion of the seventh circuit was based upon a greater familiarity with these proceedings than is typically present.

There can be little if any question that the seventh circuit was correct in its determination that the petitioners' second appeal was frivolous. The application of the doctrine of collateral estoppel—the issue which the appellant-petitioners now claim must be re-examined yet another time—was soundly and correctly decided in accordance with proceedings in Trecker's state court action. When the seventh circuit first vacated Judge Gordon's prior decisions and remanded, it did so with the following observation:

> All that Trecker can now be saying in this Rule 10b-5 action is that if he had known of Ransomes' negotia-

> tions during the pendency of his redemption suit, he would have abandoned it and held on to his shares. If Trecker could have done that, then neither materiality nor scienter is precluded and he has stated a claim under Rule 10b-5. . . . We regret further complications in an already protracted and internecine struggle, *but the case should not have been resolved, and on remand cannot go forward, without an adequate development by the parties of this important aspect of Wisconsin law.*

Trecker v. Scag, 679 F.2d 703, 709-10 (7th Cir. 1982) [Emphasis added].

About six weeks after the seventh circuit vacated Judge Gordon's decisions, and one day after it denied Scag's petitions for rehearing, the Wisconsin Court of Appeals issued a decision in Trecker's state court appeal affirming the Jefferson County trial court's denial of his motion to reopen its previously entered judgment. *Trecker v. Wisconsin Marine, Inc.,* No. 81-1949 (July 21, 1982), Slip. Op. at 8-9. [Appendix I] Holding that Trecker's redemption demand was irrevocable, the Wisconsin Court of Appeals affirmed the trial court's determination that any change in the value of Wisconsin Marine stock after December 31, 1976, the date of valuation, was irrelevant, as it could not affect Trecker's position as a creditor of the company, and therefore could not have been instrumental in procuring the trial court judgment, a factor essential to a finding of fraud on the court. *Id.* at 10-11.

The respondents immediately moved for a reconsideration of the denial of rehearing based upon the newly issued decision of the Wisconsin Court of Appeals. While the seventh circuit did not disturb its prior rulings, its

order denying reconsideration[9] contained the following statement:

> Defendants now have the information we said they lacked and should be put before Judge Gordon . . . . When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme Court of Wisconsin should disagree with the Wisconsin Court of Appeals opinion.

[Appendix A]. The Wisconsin Supreme Court denied Trecker's petition for review and accordingly, the district court granted the defendants' summary judgment motion dismissing Trecker's 10b-5 action, citing the above-quoted language from the Wisconsin Court of Appeals' July 21, 1982, opinion and holding as follows:

> Although the context was fraud on the court rather than materiality, *there can be no doubt that the Wisconsin court of appeals had before it the issue dispositive of the case at bar.* Only if Mr. Trecker could have changed his decision to redeem his shares after learning of the Ransomes negotiations would the non-disclosure have been a fraud on the trial court. Similarly, only if Mr. Trecker could have changed his investment decision after learning of the Ransomes negotiations would the non-disclosure be material under SEC Rule 10b-5. The Wisconsin court of appeals resolved this issue of state law unambiguously[.] . . .

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[9]The petitioners also attempt to skew the equities in this matter by suggesting that the appeal was not frivolous because they lost in an ex parte proceeding to which they were not able to respond, Petition at 9, that had they been able to do so, "the matters would have ended at that time," Petition at 10, and that the appeal was simply their opportunity to challenge the seventh circuit's order directing the entry of summary judgment. Petition at 11. The astonishing lack of logic of this position is that the seventh circuit found the substance of the petitioner's arguments meritless, and those arguments would have been no less meritless had they been presented slightly earlier.

> On October 12, 1982, the Wisconsin supreme court denied the plaintiff's petition for review; thus, the state court of appeals' pronouncement on state law is authoritative. Applying that law to this Rule 10b-5 action, I must grant the defendants' motion for summary judgment on the ground that *non-disclosure of the negotiations between WMI and Ransomes was immaterial to Mr. Trecker's decision to redeem his shares because, under state law, he could not have changed his decision after learning of the negotiations.*

Trecker v. Scag, 569 F. Supp. 744, 747 (E.D. Wis. 1983) [Emphasis supplied].

Even after the seventh circuit virtually directed the district court to enter summary judgment based upon the Wisconsin Court of Appeals' clarification of the state law issue, Trecker again sought an appeal before the seventh circuit, claiming that the Wisconsin Court of Appeals' July 21, 1982 determination of state law should not have been given collateral estoppel effect. The Court of Appeals for the Seventh Circuit properly rejected that position.

Collateral estoppel is a common-law doctrine to the effect that "[o]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States,* 440 U.S. 147, 153 (1979). *See also Allen v. McCurry,* 449 U.S. 90, 93-94 (1980); *Parklane Hosiery Company v. Shore,* 439 U.S. 322, 326 (1979); *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49 (1897). Where a state court judgment or determination is sought to be given collateral estoppel

effect, 28 U.S.C. § 1738, the statutory counterpart of U.S. Const. Art. I, § 4, requires federal courts to accord it the same preclusive effect as would the courts of that state. *Haring v. Prosise,* 462 U.S. 306, 76 L.Ed.2d 595, 603-04 (1983); *Allen v. McCurry,* 449 U.S. at 96.

The doctrine is applicable, however, only where the parties have had "a full and fair opportunity to litigate the issue to be precluded." *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 480-81 n.22 (1982); *Allen v. McCurry, supra,* at 95; *Montana v. United States, supra,* at 153. This is also in substance the same standard for application of the doctrine of collateral estoppel used by Wisconsin courts. See *State ex rel Flowers v. DH&SS,* 81 Wis. 2d 376, 387, 260 N.W.2d 727, 734 (1978); *Reckner v. Reckner,* 105 Wis. 2d 425, 436, 314 N.W.2d 159, 165 (Ct. App. 1981). To be the product of a full and fair opportunity to litigate, such that a judgment is entitled to collateral estoppel effect, the state proceedings producing the judgment "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's due process clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer v. Chemical Construction Corp., supra,* at 482.

The seventh circuit found that Trecker had had a full and fair opportunity to litigate the redemption withdrawal issue in state court. *Trecker v. Scag,* 747 F.2d 1176, 1179 (7th Cir. 1984). In reaching that determination, the court recognized that the Wisconsin Court of Appeals in its second decision acknowledged that Trecker had argued the redemption withdrawal issue. Trecker pressed the same issue again before the Wisconsin Supreme Court in

his petition seeking review of the Court of Appeals' July 21, 1982 decision.

It could not be contended seriously that the determination of the irrevocablity of Trecker's stock redemption demand was not accompanied by minimal procedural due process. The issue was considered tangentially by the Wisconsin Court of Appeals early in the state court litigation when it affirmed the trial court's selection of December 31, 1976, as the stock evaluation date.[10] The issue was again presented in connection with Trecker's effort to reopen the state court judgment of specific performance on the ground of fraud on the court, and it was squarely framed and decided as the dispositive issue in the Wisconsin Court of Appeals' decision of July 21, 1982, affirming the trial court's denial of Trecker's motion to reopen the judgment. Finally, it was duly raised in Trecker's petition for review before the Wisconsin Supreme Court. This is not the procedural history of an issue that has not been accorded procedural due process; rather, it illustrates as intensive a course of judicial scrutiny and consideration as can be brought to bear on a legal issue.

These judicial proceedings, each of which provided the petitioners many opportunities to present their arguments to the Wisconsin courts, prompted the seventh circuit rightly to conclude that "There is no doubt that the plaintiff received a full and fair opportunity to litigate this issue in the Wisconsin courts and he has pointed to nothing in the record which would suggest otherwise. Having lost in state court, he cannot ask the federal courts to reconsider the same question." *Trecker v. Scag*, 747 F.2d

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[10]The seventh circuit did not accord that determination collateral estoppel effect because it viewed the state appeals court's determination as "dicta." See *Trecker v. Scag*, 747 F.2d 1176, 1179 (7th Cir. 1984).

at 1179. This conclusion was an appropriate application of collateral estoppel which furthered the salutary purpose of protecting the respondents "from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. at 154-55.

III. The Court Of Appeals Did Not Base Its Assessment Of Costs And Fees Upon Either 28 U.S.C. § 1927 Or Rule 11, Federal Rules Of Civil Procedure, And Accordingly, Their Provisions Are Not Properly Under Review.

The court of appeals relied upon Rule 38, Federal Rules of Appellate Procedure, for its authority to assess double costs and attorneys fees. It did not invoke 28 U.S.C. § 1927, nor did it rely on Rule 11, Federal Rules of Civil Procedure, which, like all of the federal rules of civil procedure, "govern the procedure in the United States district courts in all suits of a civil nature," Rule 1, Federal Rules of Civil Procedure, and likewise is not applicable. Instead, Attorney Braun was sanctioned for violating a standard of professional conduct and appropriate use of judicial process that has evolved over nearly 200 years and that is not in need of clarification.

IV. This Petition For Writ Of Certiorari Is Frivolous And Therefore Attorney Braun Should Be Assessed Double Costs And Actual Attorneys' Fees.

This Court has the authority to assess double costs and attorneys' fees when an appeal or petition for writ of certiorari is frivolous. *Tatum v. Regents of the U. of Nebraska,* — U.S. —, 103 S.Ct. 3084 (1983); Rule 49.2, Rules of the Supreme Court of the United States; 28 U.S.C. §§ 1912 and 1927. See also 13, *Moore's Federal*

Practice ¶ 849.03 at S.C. 49-7. Historically, when a writ of error had no plausible ground to support it, or if there was nothing in the record to show error in the court below, this Court awarded damages. See *Deming v. Carlisle Packaging Company,* 226 U.S. 103 (1912); *Texas & Pacific R.R. Company v. Volk,* 151 U.S. 73 (1894); *Walker v. Dreville,* 79 U.S. 440 (1871).

Measured by these standards, the petition for writ of certiorari submitted by Trecker and Attorney Braun is frivolous. To the extent it challenges the appellate court's assessment of double costs and attorneys' fees against Attorney Braun personally, it fails to establish that the court's exercise of discretion was inappropriate or unaccompanied by appropriate procedural protections. To the extent that it seeks once again to relitigate the irrevocability of Trecker's stock redemption demand and the collateral estoppel effect to be given to the state court's determination of that issue, it simply does not raise legal arguments of substance.

The petitioners have established none of the criteria governing review by this Court pursuant to Rule 17, Supreme Court Rules. Rather, they ask this Court to accept review to correct a claimed "patently erroneous state court ruling" on a "fundamental rule[] of contract law." Petition at 14. Aside from the fact that the petitioners have made no showing of any error in a state court proceeding (no doubt because none has occurred), the petitioners confuse contract law with the law of judgments. The state court has determined not only that Trecker's demand for redemption under the contract was irrevocable, but also that, once he reduced his demand to judgment and obtained specific performance, he could not reopen that judgment, even for alleged fraud on the court. See *Trecker v. Wisconsin Marine, Inc.*, No. 81-1949 (July

21, 1982) (Slip. Op.). Furthermore, although the respondents submit that no error occurred in the state courts' determination of state law, error correction is not a primary function of this Court and is not a proper basis for seeking review. See *Board of Education of Rogers, Ark. v. McCluskey,* 458 U.S. 966, 971 (1982) (Stevens, J., dissenting); *Boag v. MacDougall,* 454 U.S. 364, 367-68 (1982) (Rehnquist, J., dissenting).

Trecker and Braun have compounded frivolous appeal upon frivolous appeal, and, as in the court of appeals below, they should be made to bear the financial burden of carrying this "protracted and internecine struggle," *Trecker v. Scag,* 679 F.2d at 710, to yet another level of unnecessary judicial consideration.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its decision in *Trecker v. Scag,* 747 F.2d 1176 (7th Cir. 1984) be denied with double costs and actual attorneys' fees awarded to respondents.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
July 30, 1982

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

THOMAS M. TRECKER,
Plaintiff-Appellant,

No. 81-1888 vs.

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS and JEFFERIES, LTD.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 79 C 694
Myron L. Gordon, Judge.

ORDER

Defendants' motion for leave to file the Wisconsin Court of Appeals July 21, 1982 opinion in *Trecker v. Wisconsin Marine, Inc.*, is granted. The motion to reconsider the denial of the petition for rehearing is denied.

Defendants now have the information we said they lacked and should put before Judge Gordon, see pages 13-14 of our June 3 slip opinion. When they do so, we are confident that Judge Gordon will take appropriate action unless the Supreme Court of Wisconsin should disagree with the Wisconsin Court of Appeals opinion. Nothing in our slip opinion requires a change in the light of the Wisconsin Court of Appeals July 21 opinion in *Trecker v. Wisconsin Marine, Inc.*

APPENDIX B

Relevant parts of Mr. Koch's [Mr Scag's attorney] statements to court at that hearing are as follows:

Mr. Koch: . . . a current deal that we have while it was in process was so far from completion that we weren't really in a position to definitely say that we would be able to redeem in cash. At the present time in order to accomplish what we have to accomplish to further our agreement with this other company, Mr. Scag had to mortgage his house to pay the difference between $124,000 some odd dollars which was the December, 1973 value of the stock and the amount of this judgment whatever that figure is, Scag has to come up with the difference and put that in the company and then in addition to that the company with the consent of the bank is going to be permitted to come up with the other $120,000, you know, that we had to have $160 some thousand. [TR. 386]

* * *

Mr. Koch: . . . Now, I'd like to point out several important facts. Number one, is that Scag has to come up with additional $40,000 some dollars to this deal for which he'll never recoup a penny of it. As a result of this this company is going to pay the additional $124,000 and an additional $500,000 worth of working capital. Then the company will then continue its operation for a year until I believe it is September of 1979. Up until that time this company that's acquiring this business has a right to call off the whole deal at any time and at that point in time Wisconsin Marine will then have to pay back

under a prescribed arrangement the money that was advanced by this company. [Tr. 388-89]

* * *

Mr. Koch: . . . we got a half a million dollars we are going to get as working capital for this company and if he [Trecker] obstructs our deal maybe he should be required to put up a half-a—$624,000 bond is what Ransoms [sic] is coming up with to guarantee that we're taken care of in the event that something goes wrong here because that's what we are being deprived of, $624,000 in cold hard cash. [Tr. 395-96]

* * *

Mr. Koch: Mr. Braun has intimated that we are toying with the truth and I frankly take umbrage with it plus the fact that Mr. Braun was, as I said, offered an opportunity to look at the contract plus the fact that in the contract pursuant to my affidavit I said that the value of Trecker's stock over $124,176 has to be brought up by Mr. Scag with the exception of 50% of the interest but 124,000 of the principal over that figure Scag has to come up with the difference. [Tr. 407-08]

Mr. Braun: The stock should be held for security for the eventual disposition.

Mr. Koch: Wait a minute here, I've got this contract that I'm going to have $625,000 poured into the company. [Tr. 420]

* * *

Mr. Braun: Your honor, I'd like to make an offer of proof with reference to this matter . . . . That if Mr. Prieve were required to testify he would explain the formula under

which this company is being sold, that essentially this formula is that Ransoms [sic], Simms [sic], is advancing $500,000 to Wisconsin Marine, Inc. for working capital and if the company continues to be viable for a period of one year or perhaps 18 months the date set out in the affidavit I believe is September 30th of 1979, that then all of the stock of Wisconsin Marine, Inc. will be purchased by the British affiliate. [Tr. 424-26]

APPENDIX C

[Page 12 of Respondents' Brief]

be determined under State law[3] and in the circumstances by the Wisconsin State Courts. Those rights have been clearly and finally adjudicated and this Court must give full force and effect to those determinations.

The conclusive and binding effect of the Wisconsin determinations coupled with the prior holding of this Court make the situation so clear that appellant's position is frivolous. His appeal should be dismissed on that ground. We urge that this Court make that determination and not only affirm the judgment of the lower court but require the appellant to pay to the defendant-appellee and his counsel extraordinary costs because of this unnecessary appeal.

That this Court has the power to do so is so clear that supporting authority is not required. This case has a long and egregious history. We believe that from the beginning the appellant's position has been so basically unfounded, and particularly this appeal, that such remedy is appropriate in this case.

—o—

CONCLUSION

The circumstances of this appeal are peculiar and perhaps unique, for after its original decision reversing the earlier summary judgment, this Court very clealy pointed the way after the Wisconsin Court of Appeals held that appellant

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[3]*Trecker v. Scag*, 679 F2d 703, 709 (1982). "His right to redeem was governed by state law . . ."

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Docket No. 83-2725

THOMAS M. TRECKER,

Plaintiff-Appellant,

vs.

DANE T. SCAG,
WISCONSIN MARINE, INC. and
RANSOMES, SIMS AND JEFFERIES, LTD.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Wisconsin

The Honorable Myron L. Gordon, District Judge

REPLY BRIEF OF PLAINTIFF-APPELLANT

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FACTS

Regarding the facts set out in the brief filed on behalf of Scag, WMI and Ransomes, the court's attention is directed to the following language found at page 1 of that brief:

> "The reason judgment in Judge Gergen's court provided for payment of the redemption amount in three payments, was not only because of the then financial position of the company but also because that is what the agreement provided, just as it had pro-

vided five percent interest, which was awarded to Trecker as part of his judgment. (App. 157)."

This quoted language is inaccurate and extremely misleading on an important point. It should be compared to the provision of the Stock Purchase Agreement to which it refers:

"2. *Voluntary Separation*

In the event that the Stockholder desires to leave the employment of the Company and terminate his employment, he shall sell back the stock which he owns of the Corporation to the Company for its book value or the original issuance price, whichever is the higher. *The price to be paid for the stock shall be paid in equal quarterly installments without interest over a one year period.* However, if the separation takes place between the date of this agreement and December 31, 1973, no payment shall be required until March 31, 1974. However, interest shall accrue at the rate of 5% per annum from the date of the original note issuance." (emphasis added)

Note the provision for payment in equal quarterly installments without interest over a one-year period. Because the demand for redemption was made on December 29, 1973, the initial payment was not due until March 31, 1974. Between December 29, 1973 and March 31, 1974, it would appear that Trecker was entitled to five percent interest on the book value of the stock. On March 31, 1974, the first quarterly payment was due. Thereafter, Trecker was not entitled to interest and the subsequent quarterly payments would have been due on June 30, September 30 and December 31, 1974.

Contrary to the contention in the Seag brief, the Stock Purchase Agreement made no provision for delayed payment. Failure to pay in four quarterly installments

starting on March 31, 1974, was a breach of contract. This breach was apparently not intentional because Wisconsin Marine, Inc. never had sufficient money to pay Trecker pursuant to the agreement through and including the date of judgment, which was entered on May 23, 1978. It was solely because of the lack of funds that Judge Gergen provided in the judgment for Wisconsin Marine, Inc. to pay for Trecker's stock in three installments, "One-third forthwith, one-third on January 31, 1979 and one-third on October 30, 1979 . . .".

In all other respects, Trecker relies on the facts as stated in his principal brief.

THE DECISIONS OF THE WISCONSIN COURT OF APPEALS IV ON NOVEMBER 27, 1979 AND JULY 21, 1982 HOLDING THAT TRECKER'S DEMAND FOR REDEMPTION COULD NOT HAVE BEEN WITHDRAWN AT ANYTIME AFTER DECEMBER 29, 1973 SHOULD NOT BE GIVEN COLLATERAL ESTOPPEL EFFECT IN THE PENDING SEC. 10(b) ACTION.

The briefs of the parties make very clear that there is a single overriding issue presented to the court for resolution. That is, whether Trecker had the right to withdraw his demand for redemption at anytime prior to May 23, 1978 when judgment was entered in his state court redemption action. If his demand for redemption could not have been withdrawn, the fraud of Scag and his counsel was not material. If Trecker could have withdrawn his demand, the fraud of Scag and his counsel was material and the case should be returned to the district court for trial to establish the damages arising out of the fraud.

Trecker concedes that the Wisconsin Court of Appeals IV in its decisions on November 27, 1979 and July 21, 1982 stated that his demand for redemption could not have been withdrawn at anytime after it was made on December 29, 1973. (App. 109, 122, 161). Trecker contends that these holdings of the Wisconsin Court of Appeals IV should not be given collateral estoppel effect because the issue of his right to withdraw was never "fully and fairly litigated" in the state court before Judge Gergen who granted Trecker judgment of specific performance, and set the date on which his stock should be valued; nor was it litigated before Judge Danforth who considered Trecker's motion to re-open judgment after the fraud had been discovered.

Whether Trecker could withdraw his demand for redemption simply was not before Judge Gergen, and he did not consider any aspect of that issue. Judge Danforth did not understand that the primary basis of Trecker's claim of fraud was nondisclosure before judgment. Danforth assumed that the fraud Trecker complained of occurred after judgment and, therefore, denied the reopening. (App. p. 154). The Court of Appeals IV understood this deficiency in Danforth's analysis, but chose to disregard it and decided the issue on the appeal record. (App. p. 108). This certainly does not constitute a "full and fair litigation" of whether Trecker could have withdrawn his demand for redemption.

Had Trecker been advised by Scag on February 24, 1978 that a letter of intent had been signed with Ransomes for the sale of WMI, he would have asked Judge Gergen to dismiss his stock redemption action or at least hold it in abeyance until the offer was confirmed. In

dealing with such a request, Judge Gergen would have necessarily had to consider the following matters:

1. *The language of the agreement.* There is nothing in the language of paragraph 2 of the Stock Purchase Agreement which would permit the conclusion that a demand for redemption was irrevocable. Judge Gergen did not discuss this problem because the issue was not before him.

2. *Breach of the obligation to purchase Trecker's stock.* Trecker demanded redemption of his stock on December 29, 1973. Under the language of the Stock Purchase Agreement, WMI became obligated to buy his stock over a one-year period in four quarterly installments commencing on March 3, 1974. Those installments would have become due on March 31, June 30, September 30 and December 31, 1974. WMI did not make those payments because it was not in a financial position to do so, a condition which continued up to and including the date of judgment, May 23, 1978. If Judge Gergen had been confronted with the issue of Trecker's right to withdraw his demand for redemption, he would necessarily have discussed the effect of WMI's breach of the stock Purchase Agreement. Trecker could have argued persuasively that he should not be bound by a Stock Purchase Agreement which had been materially breached by WMI through its failure to pay for his stock according to the terms of the agreement. Judge Gergen did not discuss the effect of WMI's breach of the contract because the issue of Trecker's right to withdraw his demand for redemption was not before him.

3. *Trecker's pledge of credit.* If Judge Gergen had confronted the issue of Trecker's right to withdraw his

demand for redemption, he would also necessarily have had to deal with the fact of Trecker and his wife pledging all of their assets to sustain the credit of WMI and to permit its continued growth in the years between 1973 and 1978. As late as 1975, Trecker and his wife were called upon to make an additional guarantee for a $500,000.00 loan which was necessary after a serious fire at the company plant. These guarantees were not released until March, 1978. Judge Gergen did not discuss this problem because the issue of Trecker's right to withdraw his demand for redemption was not before him.

This analysis should demonstrate conclusively that the issue of Trecker's right to withdraw his demand for redemption was never "full and fairly litigated" in the state court. *Butler v. Stover Brothers Trucking Co.*, 546 F.2d 544 (7th Cir., 1977). It was this kind of analysis that Judge Cummings made in his June 3, 1982 decision (679 F.2d 703, 1982) when he said at page 709:

> "The defendants did argue that a state court finding—that Trecker had become a creditor rather than a shareholder of WMI as of his 1976 redemption demand—amounted to a decision that his election was irrevocable then, and that this finding should be given collateral estoppel effect in the federal litigation. The district court correctly rejected that contention, 500 F.Supp. at 753. The state court was only concerned with choosing an appropriate valuation date, not with whether Trecker could have changed his mind about the lawsuit."

This holding of the Seventh Circuit should not have been disregarded by Judge Gordon; further, it should not be reversed in this appeal.

SINCE THE ISSUE OF COLLATERAL ESTOPPEL BASIC TO THE SECOND APPEAL HAS ALREADY BEEN DECIDED, SUMMARY REVERSAL SHOULD BE CONSIDERED.

On December 14, 1983, Richard S. Gibbs, attorney for the defendants-appellees, made a separate motion for summary disposition of the appeal. Trecker concurs that summary disposition should be considered.

In dismissing this action in the district court, Judge Myron Gordon held that the rulings of the Court of Appeals IV that Trecker could not withdraw his demand for redemption, had to be given collateral estoppel effect. It has been pointed out repeatedly in these briefs that th Seventh Circuit in its June 3, 1982 decision had unequivocally determined that the ruling of the state courts, holding Trecker's demand for redemption irrevocable, should not be given collateral estoppel effect. Unless the Seventh Circuit seriously considers t e possibility of reversing itself on this issue, there is little point in granting this appeal full consideration including oral argument. The court is urged to hold that the collateral estoppel issue was cleary and precisely ruled on in its previous decision, and return the case to the district court for trial.

CONCLUSION

The brief filed on behalf of Scag, WMI and Ransomes does not meet Trecker's argument that the right to withdraw his demand for redemption was never "fully and fairly litigated" in the state court; nor does it meet Trecker's argument that the collateral estoppel issue has

already been decided in his favor in the June 3, 1982 decision of the Seventh Circuit Court of Appeals in this case. 679 F.2d 703 (1982).

The case should be returned to the district court for trial. Circuit court Rule 18 should apply.

Dated at Milwaukee, Wisconsin this 4th day of January, 1984.

/s/ Hugh R. Braun
Attorney for Thomas M. Trecker

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Docket No. 83-2725

THOMAS M. TRECKER,

Plaintiff-Appellant,

vs.

DANA T. SCAG, WISCONSIN MARINE, INC. and RANSOMES, SIMS AND JEFFERIES, LTD.,

Defendants-Appellees.

SUGGESTION TO DISMISS WITHOUT ORAL ARGUMENT

Appellees by their counsel suggest that the appeal herein should be dismissed and the judgment of the District Court be affirmed without oral argument. The reasons therefor are:

1. The appeal is frivolous.

2. The Wisconsin Courts have authoritatively decided the dispositive issue.

3. The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. (See FRAP 34 and Circuit Rule 14(f).

Dated at Milwaukee, Wisconsin this 14th day of December, 1983.

/s/ Richard S. Gibbs
Attorney for the Defendants-Appellees

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APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Docket No. 83-2725

THOMAS M. TRECKER,
Plaintiff-Appellant,

vs.

DANA T. SCAG, WISCONSIN MARINE, INC. and RANSOMES, SIMS AND JEFFERIES, LTD.,
Defendants-Appellees.

STATEMENT BY TRECKER AS TO NEED FOR ORAL ARGUMENT

Trecker, the plaintiff-appellant, requests oral argument pursuant to the provisions of App. Rule 34 and Circuit Rule 14(f) for the following reasons:

1. The customary rule of oral argument should not be altered in this case. While Scag, WMI and Ransomes may argue that the appeal is frivolous, the case involves a monstrous and outrageous fraud, clearly in violation of Sec. 10(b) of the Securities and Exchange Act of 1934. The defendants deliberately failed to disclose negotiations for the sale of Trecker's stock in the course of his state court redemption action. The effect of the fraud is that Trecker was paid $165,000.00 for his 400 shares in WMI on June 28, 1978. On June 30, 1978, the same amount of stock was sold to Ransomes for $624,176.00. Thereafter, Scag sold his 600 shares in WMI to Ransomes for an undisclosed amo nt.

2. The issue on appeal is whether the rulings of the Wisconsin Court of Appeals IV on November 27, 1979 and July 21, 1982, that Trecker had made an irrevocable election to have his stock redeemed in 1973, should have collateral estoppel effect in the district court. That precise

issue was decided in Trecker's favor in this case on June 2, 1983. 679 F.2d 703 (7th Cir., 1983). When the case was returned for trial, District Judge Gordon dismissed it again, on the same ground relied on his first dismissal, namely, that Trecker's demand in December, 1973 to have his stock redeemed was irrevocable. The only basis for this disregard of the Seventh Circuit's decision on the issue of collateral estoppel was that on July 21, 1982 the Wisconsin Court of Appeals IV re-affirmed its 1979 ruling that Trecker's demand for redemption was irrevocable; the matter was before the Court of Appeals IV on Trecker's application to re-open the state court stock redemption action judgment, which Trecker claimed was procured by fraud.

Trecker suggests in his reply brief at page 7 that under these circumstances, Judge Gordon's second dismissal of this action should be summarily reversed. If the court chooses not to take such action, it should grant oral argument as part of its full review.

3. While the decision of the Court of Appeals IV on June 3, 1983 accurately summarized the facts and precisely analyzed the issues of law, oral argument would aid the court in evaluating Judge Gordon's remarkable refusal to follow its direction on remand and its holding on the collateral estoppel issue.

Dated at Milwaukee, Wisconsin this 29th day of June, 1984.

/s/ Hugh R. Braun
Attorney for Thomas M. Trecker

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APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Docket No. 83-2725

THOMAS M. TRECKER,

Plaintiff-Appellant,

vs.

DANA T. SCAG, WISCONSIN MARINE, INC. and RANSOMES, SIMS AND JEFFERIES, LTD.,

Defendants-Appellees.

MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING REGARDING THE ASSESSMENT OF DOUBLE COSTS AND REASONABLE ATTORNEY'S FEES

Hugh R. Braun
Counsel for Plaintiff-
Appellant

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Telephone: (414) 278-8500

FACTS

The Court has assessed double costs and reasonable attorney's fees against plaintiff's counsel. This extraordinary action was taken because the Court believes that counsel should have understood from its Order of July 30, 1982 that an appeal from a dismissal of the pending action in the District Court would not be successful.

Counsel brings this motion for rehearing on the limited issue of the imposition of double costs and reasonable attorney's fees.

THE JULY 30, 1982 ORDER

Before this appeal was taken and during the proceedings before the District Judge, the import of the July 30, 1982 Order was carefully analyzed. The Seventh Circuit was apparently saying that the July 21, 1982 decision of the Wis. Court of Appeals IV, holding that Trecker's demand for redemption was irrevocable, was to be given collateral estoppel effect in the District Court. Why then did plaintiff's counsel proceed to oppose the motion to dismiss the case in the District Court and eventually appeal the dismissal to the Seventh Circuit? The appeal was taken for the following reasons:

> The July 30, 1982 order was formulated in response to Scag's motion to recondsider the denial of his petition for rehearing of the decision which had returned the case to the District Court for trial. *Trecker v. Scag,* 679 F.2d 703 (7th Cir. 1982). Under Rule 40(a) Fed. R. App. P, Trecker had no opportunity to be heard on the issue of whether the 1982 ruling of the Wis. Court of Appeals IV should be given collateral estoppel effect in the District Court. The order of July 30, 1982 was an ex-parte order which had the effect of dismissing his case.
>
> Did not counsel have an absolute duty to submit Trecker's arguments that the 1982 ruling of the Wis. Court of Appeals IV, like its 1979 ruling, should not be given collateral estoppel effect? In another forum might counsel not be held to have breached a professional duty to his client by not objecting to the very determination that dismissed the case.
>
> While Trecker's position was briefed and argued in the District Court, the existence of the July 30, 1982 Order preclued acceptance of his arguments there. The only way Trecker could have his arguments heard on the depositive issue of the case was to appeal to

the Seventh Circuit where the July 30, 1982 Order had been promulgated.[1]

EVIDENCE OF BAD FAITH

All of the arguments submitted by Trecker in his brief were rejected as frivolous and raising them seemed to the Court to be evidence of bad faith. Concerning those conclusions, the Court is asked to consider:

1. The application of the doctrine of collateral estoppel was an extremely difficult issue in this case. The capable trial judge first ruled against the application of the doctrine 481 F.Supp. 861 (E.D. Wis. 1979); he later reversed his position on the issue. 514 F.Supp. 364 (E.D. Wis. 1981). The Seventh Circuit in 679 F.2d 703 (7th Cir. 1982) held that Judge Gordon was right in 1979 when he held that the Wis. Court of Appeals IV ruling was not to be given collateral estoppel effect in the District Court. This is a very complex case. Both State and Federal Courts have had difficulty with the issues. Thus it appears to be more like the circumstances in *Gilles v. Burton Construction Co.*, 736 F.2d 1142 (7th Cir. 1984) where the Court declined to impose sanctions and quite different from the circumstances in *Reid v. United States*, 715 F.2d 1148 (7th Cir. 1983), where there was objective evidence of harassment, and sanctions were imposed.

---

[1]In retrospect it may have been wise for plaintiff's counsel to ask for a review of the July 30, 1982 Order when it was issued, although Rule 40 does not provide for such a challenge. Had the Seventh Circuit permitted Trecker's response on the import of the 1982 Wis. Court of Appeals IV ruling, and then issued an order directing the District Court to dismiss the case unless the Wisconsin Supreme Court disagreed, the matter would have clearly ended at that time.

2. The affidavits of counsel support the conclusion that there could not possibly have been a basis for this appeal other than the hope of prevailing. There is no evidence of intent to delay, harassment of obstinancy. Why would Trecker return to this Court with a frivolous appeal? There must have been some honest hope of prevailing.

3. The imposition of double costs and attorney's fees as a sanction on counsel for bringing what is judged to be a frivolous appeal can impose a significant financial burden. But the more serious consequence is the effect of the ruling on counsel's relation with his clients, and his standing in the local community and the local Bar. Prosecuting a frivolous appeal can be considered professional misconduct in Wisconsin. *Sommer v. Carr,* 99 Wis. 2d 789; 299 N.W.2d 856 (1981). There may have been evidence in this record of bad judgment, but is there any evidence in the record to establish bad faith?

CONCLUSION

There must be an end to litigation. There must be respect for the Courts. There must be acceptance of a final determination. Accordingly, the sole relief sought under the pending motion is reconsideration of the imposition of double costs and fees on plaintiff's counsel personally.

Dated at Milwaukee, Wisconsin this 19th day of November, 1984.

Respectfully submitted,

/s/ Hugh R. Braun

G-5

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 83-2725

THOMAS M. TRECKER,

Plaintiff-Appellant,

v.

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD.,

Defendants-Appellees.

AFFIDAVIT OF COUNSEL REGARDING THE ASSESSMENT OF DOUBLE COSTS AND FEES

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

HUGH R. BRAUN, being first duly sworn, respectfully states as follows:

1. That the affiant is the attorney of record for Thomas M. Trecker in the captioned appeal; that he makes this affidavit in connection with the determination by the Court of the appropriateness of assessment of double costs and reasonable attorney's fees against plaintiff's counsel personally.

2. That this appeal was not commenced for reasons of delay; as Trecker's primary objective was redress of a claimed fraud involving more than Five Hundred Thousand Dollars ($500,000.00), the expeditious disposition of this case was in his interest.

3. That the appeal was not perfected for any reasons of harassment; that Trecker's original demand for redemption of his stock was prompted by dire financial need; that while Trecker's financial condition has improved, he was not in a position financially to harass the defendant Scag or the other two corporate defendants.

4. That this appeal was not motivated by obstinancy or stubbornness; that all of the litigation relating to Mr. Trecker's stock in Wisconsin Marine, Inc. imposed severe financial burdens on him; that affiant fashioned fee arrangements which accommodated these problems; that the sole economic benefit that could have arose from this appeal depended on winning the appeal.

5. That the only purpose of this appeal was the reasonable expectation that the Seventh Circuit, upon a full evaluation of the decision of Judge Danforth on reopening, and the affirmance of that decision by Wisconsin Court of Appeals IV, would deny it collateral estoppel effect because it did not involve a full and fair litigation of the issue of whether Trecker could have withdrawn his additional demand for redemption.

6. That at the time this appeal was perfected, counsel had clearly in mind the full contents of the Seventh Circuit's order dated July 30, 1982; that Trecker, however, had not been given an opportunity to present to the court his view of the significance of the July 21 decision of the Wisconsin Court of Appeals IV because the July 30, 1982 order of the Seventh Circuit was formulated in connection with the defendants' petition for rehearing; that Trecker was not permitted to participate in that proceeding under Rule 40(a) Fed. R. App. P.; counsel believed he had a compelling duty to submit Trecker's argu-

ments regarding the significance of the July 21, 1982 decision of the Wisconsin Court of Appeals IV to the Seventh Circuit, since the entire case now turned on the interpretation of that decision. That the only way Trecker's arguments could be heard by the Seventh Circuit is through this appeal.

Dated at Milwaukee, Wisconsin this 19 day of November, 1984.

/s/ Hugh R. Braun

Subscribed and sworn to before
me this ..... day of November, 1984.

.....

Notary Public, State of Wisconsin
My commission: .....

APPENDIX H

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 25, 1985

Appeal from the United States District Court for the Eastern District of Wisconsin.

By the Court:

No. 79-C-694

Myron L. Gordon, Judge.

THOMAS M. TRECKER,

Plaintiff-Appellant,

No. 83-2725

vs.

DANE T. SCAG, WISCONSIN MARINE, INC., and RANSOMES, SIMS AND JEFFERIES, LTD.,

Defendants-Appellees.

This matter comes before the court for its consideration upon the "BILL OF COSTS ON APPEAL" filed herein on November 20, 1984, by counsel for the defendants-appellees.

By published opinion of November 6, 1984, the judgment of the district court was affirmed and double costs and "reasonable attorneys' fees were assessed against plaintiff's counsel." Defendants-appellees request $3,465.00 as reasonable attorneys' fees and no objection has been received. Accordingly,

IT IS ORDERED that attorneys' fees, in the amount of $3,465.00, are awarded to defendants-appellees.

APPENDIX I

[Excerpt from *Trecker v. Wisconsin Marine, Inc.*, No. 81-1949 (July 21, 1982), Slip. op. at 8-9]

Trecker argues that had the trial court known that all of the stock of Wisconsin Marine was to be sold to Ransomes, the court would have allowed him to withdraw his stock redemption demand. That option was not available to Trecker. On our opinion in *Trecker*, supra, at 9-10, we stated:

> "On December 29, 1973, Trecker exercised his right to convert his equity interest in the corporation to debt. He gained the certainty that he would be paid before the claims of the remaining equity holders, and lost the right to participate in the continued growth of the corporation if it prospered. . . . [I]t is not equitable for a potential litigant to adopt a "wait-and-see" position and choose his remedy with the benefit of hindsight. Trecker's arguments place him in the enviable position of making a demand that his stock be redeeemed, and then waiting to see if the corporation's stock increased or decreased in value. Had the value of the stock decreased after Trecker's notice to the board in 1973, it is unlikely that Trecker would have requested specific performance; instead he would have sued at law for the value of the stock on December 29, 1973."

Trecker's rights as against Wisconsin Marine were fixed on December 29, 1973. He cannot convert his interest in the corporation from equity to debt and back again, according to the corporation's changing financial circumstances. His decision is irrevocable.